IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1548

CALIFORNIA BREWERS ASSOCIATION, ET AL., *Petitioners,*

v.

ABRAM BRYANT, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICI CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

JACK GREENBERG
JAMES M. NABRIT, III
BARRY L. GOLDSTEIN
O. PETER SHERWOOD
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
10 Columbus Circle
Suite 2030
New York, NY 10019

DANIEL B. EDELMAN
YABLONSKI, BOTH & EDELMAN
Suite 500, Connecticut Bldg.
1150 Connecticut Ave., N.W.
Washington, DC 20036

VILMA S. MARTINEZ
MORRIS J. BALLER
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
28 Geary St., 6th Floor
San Francisco, CA 94108

Attorneys for Amici Curiae

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INTEREST OF AMICI CURIAE

Amicus Curiae NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist black Americans to secure

their constitutional and civil rights by the prosecution of legal actions. The NAACP Legal Defense and Educational Fund is independent of other organizations and is supported by public contributions. For many years its attorneys have represented parties in this Court and lower courts in cases involving claims of employment discrimination under Title VII of the Civil Rights Act of 1964, including Griggs v. Duke Power Co., 401 U.S. 424 (1971), Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), and many others.

The Mexican American Legal Defense and Educational Fund, Inc., was founded in 1968 as a non-profit corporation under the laws of the State of Texas and is headquartered in San Francisco, California. Its principal purpose is to secure the civil rights of persons of Mexican descent through litigation and education. It has handled many lawsuits involving employment discrimination in this Court and lower courts, including East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977), White v. Dallas Independent School District, 581 F.2d 556 (5th Cir. 1978) (en banc), Alaniz v. Tillie Lewis Foods, Inc., 73 F.R.D. 289 (N.D. Cal. 1976), aff'd 572

F.2d 657 (9th Cir. 1978), cert. denied 99 S. Ct. 123 (1978), and many others.

Both Amici Curiae have extensive knowledge of the myriad work rules and seniority arrangements which continue to function to keep blacks and Mexican Americans at the bottom of the ladder of employment opportunities. Both are representing blacks and Mexican Americans in pending lawsuits whose outcome may be affected by the case at bar. Both are therefore concerned to advise this Court of the broad ramifications of the issue presented in this case and its importance for the economic future of the Nation'a two largest minority groups.

This brief is filed with consent of all the original parties to the litigation; consent letters are on file.

INTRODUCTION AND SUMMARY OF ARGUMENT

The collective bargaining agreement governing employment in the California brewing industry defines a "permanent employee" as "any employee...who...has completed forty-five weeks of employment under this Agreement...in one calendar year as an employee of the brewing industry in this State..." (A. 27). Individuals who have not worked forty-five weeks in any calendar year are

classified as "temporary employees" (A. 28). Insofar as "permanent" and "temporary" employees are concerned, the agreement establishes two separate seniority systems, one for each group. Under the agreement, permanent employees enjoy greater fringe benefits than temporary employees and are preferred over temporary employees in connection with job acquisition and retention. See, A.29-A.38.

The Court of Appeals observed that no black person has ever attained permanent employment status in the brewing industry in California (Pet. A. 3, 585 F.2d at 424). Because of the lessened demand for labor in recent years, it has become nearly impossible for any temporary employee, regardless of race, to work forty-five weeks in a single calendar year. Accordingly, as observed by the Ninth Circuit, the forty-five week requirement "...in effect preserves an all white class of permanent brewery employees..." (Pet. A. 2, 585 F.2d at 423). Although Plaintiff Bryant has earned his living as a brewery worker since 1968, he remains a "temporary employee," id.

The Court of Appeals correctly held that achievement of permanent employee status based on satisfaction of the 45-week

provision is not a perquisite of seniority, thus it is not within the exception to ordinary standards of liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., provided for a "bona fide seniority system" by §703(h) of that Act, 42 U.S.C. §2000e-2(h). Instead, the Court held the 45-week provision governed by the normal Title VII rule under which employment policies and practices neutral on their face and in intent are nevertheless illegal if found to have discriminatory effects (Pet. A. 12, 585 F.2d at 427).

The agreement in this case sets forth a system of preferences governing acquisition and retention of jobs. While in American industry some agreements accord preference solely on the basis of seniority, the great majority--like that in this case--determine such preferences based on combined operation of seniority and nonseniority criteria. A proper application of the Section 703(h) seniority exception must proceed from this recognition and must refrain from extending the exception to nonseniority criteria which commonly operate in combination with seniority factors in an overall job preference scheme.

The Petitioners[1] advocate a broad reading of "seniority" which would extend the Section 703(h) exception recognized in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), to the overall operation of a collectively-bargained preference scheme and preclude application of the normal rule of Griggs v. Duke Power Co., 401 U.S. 424 (1971), to separate nonseniority component criteria. As set forth below, this approach would inappropriately allow the §703(h) seniority exception to swallow up Title VII's generalized prohibitions (Part I-A, infra). It rests on a concept of seniority inconsistent with that prevailing in common parlance and industrial usage (Part I-B, infra). Indeed, it rests on a concept of seniority far broader than that articulated in suits addressing the rights of reemployed veterans where protection of seniority rights is the rule compelling a broad construction rather than an exception to a broad remedial statute (Part I-C, infra). The views of Amici Equal Employment Advisory

[1]The employer and union parties seeking reversal of the Court of Appeals' decision are referred to throughout collectively as Petitioners even though the unions are technically Respondents, not having petitioned this Court for review.

Council and the AFL-CIO recognize the pitfalls of Petitioners' contention that §703(h) should be applied to protect the overall operation of a collectively-bargained preference system; those Amici too, however, advocate a concept of seniority far broader than that prevailing in common and industrial usage and articulated by federal decisions distinguishing seniority from other criteria (Part II, infra).

ARGUMENT

I. ATTAINMENT OF PERMANENT EMPLOYEE STATUS BASED ON OPERATION OF THE 45-WEEK RULE IS NOT A PERQUISITE OF SENIORITY AND IS THEREFORE NOT WITHIN THE SECTION 703(h) SENIORITY EXCEPTION.

A. The Sweeping Construction Of The Section 703(h) Seniority Exception Advocated By Petitioners Would Inappropriately Undermine Congress' Overriding Objective Of Equal Employment Opportunity.

Petitioners contend that the Court of Appeals erred by separately scrutinizing operation of the 45-week rule apart from the overall collectively-bargained system of employee priority. To this end, they seek a sweeping construction of the §703(h) exception under which a priority system--even one combining seniority and nonseniority

criteria--would be protected as an integrated whole. Separate application of normal adverse impact principles to individual non-seniority components of the system would necessarily be barred. While this position is heavily grounded in asserted rights of freedom of collective bargaining under general national labor policy, it totally loses sight of Congress' declared objective in Title VII of rooting out discrimination in employment. Petitioners' briefs are revealingly lacking even in lip-service to Title VII's overriding objective. To the contrary, they suggest time and again that protection of seniority and unfettered bargaining rather than the elimination of discrimination and achievement of equal opportunity were Congress' foremost concerns. Their approach to §703(h) is oblivious to the established principle under which exceptions to remedial statutes are narrowly construed, which has up to now been uniformly followed by this and other federal courts. If adopted it would anomalously single out the §703(h) seniority exception for sweeping construction and allow it to swallow up the general principles heretofore held to govern.

The Court's decision in this case will neither fully insulate nor completely

prohibit any use of seniority, or any set of work rules. The Court's decision in this case may determine which of two standards will govern adjudication of challenges to a variety of work rules under Title VII. On one hand, the test of Griggs v. Duke Power Co., 401 U.S. 424 (1971), condenms a wide range of rules which adversely affect a protected minority group and are non job-related or required by business necessity; on the other, the much more limited prohibition of seniority systems which are shown to be non-bona fide, as developed in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), exempts certain "seniority systems" from review under the Griggs standard. Whatever the outcome here, a rule which does not have adverse effect on a protected minority or which is necessary for legitimate business reasons will remain intact. A practice which is not bona fide, and which discriminates, will remain subject to modification even though it is a "seniority system" within the meaning of §703(h) of Title VII. In short, in this case the Court is asked to formulate a decisional rule, not to legislate with respect to preferred or allowable forms of industrial organization.

Since the issue is to formulate a decisional rule based on statutory language, it is especially important that the Court heed the canon of construction that provisions which limit the effectiveness of remedial legislation should be narrowly construed.[2] For the question is how to read the statute when deciding cases, and the answer must look to the purpose of the Congressional enactment as its guiding principle.

1. In Enacting Title VII Congress Legislated Broadly To Eradicate Practices Which Limit Minorities' Employment Opportunities And Did Not Create A Sweeping Exception For Seniority Systems.

While Petitioners ignore Congress' overriding objective in enacting Title VII, this Court has recognized it time and again. In Griggs v. Duke Power Co., supra, 401 U.S. at 429, it declared that Congress' objective "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." This recognition has been the

[2]Respondent discusses this canon and the Court's adherence to it at length in his brief (see Resp. Br. part II). Amici will not belabor these authorities.

consistent touchstone of the Court's Title VII decisions, McDonnell Douglas Corp v. Green, 411 U.S. 792, 800 (1973); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976); Teamsters v. United States, supra, 431 U.S. at 348; Dothard v. Rawlinson, 433 U.S. 321, 328 (1977). Most recently, in United Steelworkers of America v. Weber, __U.S.__, 99 S. Ct. 2721, 2727 (1979), the Court declared that "Congress' primary concern...was with 'the plight of the negro in our economy.'"

Responsive to this objective, Title VII broadly prohibits employment discrimination and makes unlawful employment practices which "deprive and tend to deprive" any individual of employment opportunities based on race and other specified grounds. Employers and labor organizations alike are barred by the Act from engaging in such practices by Sections 703(a)-(d) and Section 704, 42 U.S.C. §§2000e-2(a), (d), 2000e-3.

The Act's prohibition of unlawful employment practices is stated in the broadest terms so as to reach all practices which deny or even may tend to deny the equal opportunity which Congress aimed to achieve,

and is subject only to limited exceptions and qualifications which have been given appropriately narrow constructions. Petitioners' argument here would have the anomalous result of allowing a uniquely broad construction for the seniority exception which would allow that exception to become the rule. No reason is apparent, for example, why the §703(h) seniority exception should sweep more broadly than that of §703(e) for bona fide occupational qualifications, which this Court has declared "was...meant to be an extremely narrow exception to the general prohibition of discrimination." Dothard v. v. Rawlinson, supra, 433 U.S. at 334.[3] The anomaly of a broad construction for §703(h)'s seniority exception is highlighted by the narrow construction given the same section's exception for use of professionally developed ability tests. In Griggs v. Duke Power Co., supra, 401 U.S. at 433-36, the

[3]As stressed by Justice Marshall in his concurring opinion in Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971), the "bfoq" exception "was not intended to swallow the rule." See Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Diaz v. Pan American World Airways, 442 F.2d 385, 387 (5th [continued next page]

Court rejected the contention that §703(h) protects professionally-developed ability tests where their use is not intentionally discriminatory. It narrowly construed the exception as immunizing only those tests where their use is not intentionally discriminatory. It narrowly construed the exemption as immunizing only those tests shown to be "demonstrably reasonable measures of job performance," and then only when no measure with lesser adverse impact is available, Albemarle Paper Co. v. Moody, supra, 422 U.S. at 425. Only recently, this Court took a similarly restrictive approach to the statement of qualification in §703(j) that nothing in Title VII "be interpreted to require... preferential treatment" to correct statistical imbalance in a particular workforce, United Steelworkers of America v. Weber, __U.S.__, 99 S.Ct. 2721 (1979). The Court rejected the invitation to read Section 703(j) narrowly so as to buttress the upholding of such voluntary efforts and thus aid Congress' aim to end discrimination. The Court stressed that Congress had said only

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Cir. 1971), cert. denied 404 U.S. 950; Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971).

that such efforts would not be required and not that they would not be permitted: "The Section does not state that 'nothing in Title VII shall be interpreted to permit' voluntary affirmative efforts to correct racial imbalances." United Steelworkers of America v. Weber, supra, 99 S.Ct. at 2729.[4]

There is nothing in Section 703(h)'s legislative history which indicates that Congress meant it to be a uniquely far-reaching qualifier on the remedial thrust of Title VII. On the contrary, the language of the "bona fide seniority system" clause is both imprecise and not fully considered by Congress.

Section 703(h) was added on the Senate floor to the bill which became Title VII, H.R. 7152 (1963), over six weeks after the insertion in the Congressional Record of the legislative materials on which Petitioners rely to show a broadly limiting Congressional intent--the Department of Justice Interpre-

[4]Petitioners read Weber as if the Court held that Title VII's prime goal was to assure the continued freedom of parties to collective bargaining to do generally as they wished. Their discussion of the case ignores that the Weber holding was dictated not by the value of unfettered collective bargaining for its own sake but by Congress' [continued next page]

tive Memorandum, the Clark-Case Memorandum, and Senator Clark's responses to Senator Dirksen's questions.[5] No discussion or debate accompanied these materials; they were simply published with a mass of Congressional documents. None of the House or Senate sponsors of either the original Title VII bill or the substitute measure and none of the authors of the legislative materials relied on by Petitioners ever drew any link between those materials and the later-added, vague terms of §703(h), or stated that Section 703(h) was intended to qualify Title VII's broad remedial thrust.[6] There is, moreover,

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overriding aim to end illegal discrimination.

[5]The Justice Department memorandum appears at 110 Cong. Rec. 7207 (April 8, 1964); the Clark-Case Memorandum at 110 Cong. Rec. 7213 (April 8, 1964); and the Clerk-Dirksen exchange at 110 Cong. Rec. 7217 (April 8, 1964). Section 703(h) was part of an amended Title VII bill which was substituted for H.R. 7152 on May 26, 1964 (110 Cong. Rec. 12,813).

[6]See, e.g., remarks of Sen. Humphrey, 110 Cong. Rec. 12,723 (1964); remarks of Sen. Dirksen, 110 Cong. Rec. 12,818-19 (1964); remarks of Rep. Celler, 110 Cong. Rec. 15, 896 (1964); remarks of Rep. McCullough, 110 Cong. Rec. 16,002 (1964).

specific legislative history demonstrating that Congress did not intend to confer on seniority systems a broad exemption from Title VII. On February 10, 1964 the House defeated a proposed amendment to H.R. 7152 which provided: "the provisions of this title shall not be applicable to any employer whose hiring and employment practices are pursuant to (1) a seniority system...," 110 Cong. Rec. 2727 (1964).

Moreover, the contents of the legislative materials from which Section 703(h) supposedly developed are anything but clear in indicating how far the Section's qualifying language was intended to cut into the sweep of Title VII. To the extent that they may be said to state any specific concern, it is to preclude the grant of super-seniority to blacks hired after Title VII's enactment which would place them ahead of whites hired before the Act, particularly in layoff situations.[7]

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[7]The Clark-Case Memorandum states, in pertinent part:

> [T]he employer's obligation would simply be to fill future vacancies on a non-discriminatory basis. He would not be obliged--or indeed permitted--to fire whites in order to

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The situations in which Congress intended §703(h) to apply, thereby limiting Title VII's potential reach, are best illustrated by Watkins v. United Steelworkers of America, Local Union No. 2369, 516 F.2d 43 (5th Cir. 1975). The plaintiff class there consisted of laid-off black employees, none of whom were the victims of any past hiring discrimination. At an earlier time the defendant company had discriminatorily denied hiring and, therefore, seniority accumulation to a different generation of black workers. The Fifth Circuit rejected the plaintiffs' claims, holding:

> Inasmuch as none of the plaintiffs have suffered individual discrimination at the hands of the Company, however, there is no past discrimination toward them which the current maintenance of the layoff system could possibly perpetuate....

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> hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier.

110 Cong. Rec. 7213 (1964) [emphasis added]. Similarly, the Department of Justice Memorandum states:

> If...a collective bargaining contract provides that in the event of layoffs those who were hired last must be laid off first, such a

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> ...regardless of what that [Congressional] history may show as to Congressional intent concerning the validity of seniority systems as applied to persons who have themselves suffered from discrimination,[8] there was an express intent to preserve contractual rights of seniority as between whites and persons who had not suffered any effects of discrimination.

The "express intent" found by the Fifth Circuit was enacted in Section 703(h), as explained by the Clark-Case materials and as explained below.

This Court followed the same narrow approach to the Section 703(h) exception in its first consideration of that provision. In Franks v. Bowman Transportation Co., supra, the Court disapproved a broad reading of the exception as barring an award of seniority relief to specific discrimination victims. The Court stressed the lack of demonstrated congressional intent to limit the relief available to discrimination victims, 424 U.S. at 762, and reasoned that availability

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> provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.

8 The reference is to the Section 703(h) issue then pending before this Court in Franks.

of such relief is essential to provide discrimination victims with a "make whole" remedy and thus satisfy Congress' objective, 424 U.S. at 767-68.

In International Brotherhood of Teamsters v. United States, supra, this Court for the first time considered the limiting language of Section 703(h) broadly. Even there, however, the Court stated that Section 703 (h) does not "immunize all seniority systems" but only those which are bona fide, 431 U.S. at 353; its acceptance of the bona fides of that system rested substantially on the concession of the United States, as plaintiff and respondent, that the particular seniority system did not have its genesis in racial discrimination and that it was negotiated and maintained free from any illegal purpose, 431 U.S. at 356. Teamsters is of course not dispositive of the seniority-definition issue presented here, because the seniority system under scrutiny there was unquestionably based on length of service and thus fits within all parties' core concept of seniority. Indeed, the Court in Teamsters appeared to assume, correctly we would urge, that different types of seniority only arise from different measures of length of time in the pertinent class of

service:

> [T]here is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant-wide systems. Then, as now, seniority was measured in a number of ways, including length of time with a particular employer, in a particular plant, in a department, in a job, or in a line of progression.... The legislative history contains no suggestion that any one system was preferred.

431 U.S. at 355 n. 41.

Teamsters read much more into the legislative materials, which purportedly explain §703(h)'s vague language, than had any other court.[9] Its reading was founded on a view of the legislative history which identified underlying §703(h),

> the understanding and assurances of the Act's proponents: namely, that Title VII would not outlaw such differences in treatment as flowed from a bona fide seniority system that allowed for a full exercise of seniority accumulated before the effective date of the Act.

431 U.S. at 352. This analysis goes beyond

[9] See, e.g., 431 U.S. at 378 n. 2. (Marshall, J., dissenting in part).

what the legislative materials clearly support and even command, in that it does not distinguish between protections offered to white incumbents as against minority workers who had not themselves accumulated seniority and who sought "fictional seniority", and as against those who had seniority and sought only to apply their accrued seniority rights to positions from which they had been excluded.[9a]

Teamsters was therefore a major incursion into the remedial effectiveness of Title VII and one not clearly commanded by the language or legislative history of §703(h), as construed in all previous appellate decisions. In the instant case, Petitioners ask the Court again to expand §703(h) greatly, building on the already expansive reading of that section contained in Teamsters. While we do not here question the Court's continuing adherence to the Teamsters reading of the section, we do suggest that the remedial policies of Title VII are ill-served by building further limitations on a foundation that itself extended the meaning of the stat-

[9a] Even this language limits the protection afforded by §703(h) to pre-Act seniority. Petitioners' reading has no such limitation.

utory language.

Nothing in the legislative history of §703(h) or the documented concerns which it is presumed to codify remotely suggests that Congress considered whether to differentiate practices like Petitioners' 45-week rule from the application of typical Title VII standards. Any attempt to equate the 45-week rule to more traditional seniority rules based on length of service depends heavily on analogy and presumption to interpret a decidedly unclear Congressional purpose. Such speculative reasoning is not an appropriate basis for a novel construction of §703(h) which would undermine Title VII's remedial purpose.

2. The Court of Appeals Decision Excluding Non-Seniority Criteria From The Reach of §703(h) Correctly Implements Title VII's Remedial Purpose.

In this case, Petitioners advocate a sweeping reading of §703(h) which would immunize seniority and non-seniority criteria as well where such criteria--such as the 45-week rule--accompany seniority rules within a single priority system. The fault of Petitioners' arguments is that they sweep too far. Petitioners themselves acknowledge that the great bulk of collectively-bargained

schemes involve systems of job acquisition, promotion and retention which combine seniority and nonseniority factors--Petitioners call these "modified seniority systems"--and that only a minority involve "straight" seniority. The mere characterization of combined systems as "modified seniority systems" is necessarily a misnomer since such systems by definition comprise nonseniority rules. Yet Petitioners claim for such systems complete immunity under §703(h).[10] They argue that any collectively bargained priority system must be assessed as an integrated whole and that scrutiny of its individual components under a Griggs test is improper because it would necessarily trench on "seniority" expectations.[11] Such arguments, if accepted, would allow the seniority exception to swallow up the Act's prohibitions in a way even more destructive of

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[10] As set forth below Amici EEAC and AFL-CIO propose accommodations somewhat limiting §703(h)'s application which are themselves untenable. See Part II, infra.

[11] One fault of this argument is that Franks itself by approving seniority relief for discrimination victims involves a shuffling of seniority expectations. Here, as shown below, the expectations affected are not genuinely "seniority" expectations be-

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its objective than that disapproved in connection with the "bfoq" and ability test exceptions.[12] This is so because it would give carte blanche to the operation of practices of whatever sort whenever occurring within a collectively-bargained priority system based in any part on seniority. Thus, in a particular collectively-bargained system, job acquisition, promotion, retention--or transfer between seniority lines--might and most often does turn on a mixture of seniority and ability or other factors. Ability is often measured by such criteria as a test, an academic degree requirement, a height and weight requirement, or even the employer's unfettered discretion.[13] The result would be an application of §703(h) which would swallow up the normal adverse impact principles of Griggs. This is the inevitable consequence of Petitioners' contention that "seniority"

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cause achieving permanent status based on satisfying the 45-week rule is not a perquisite of seniority.

[12] See p.12, supra.

[13] That is the case in connection with the system here since the employer retains the full right to choose among persons referred by the union pursuant to §§4 and 5 of the
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means, not length of service, but rather whatever parties to collective bargaining say it means, and that all collectively-bargained priority systems are "seniority systems" covered in toto by §703(h).

It is implicit both in the statutory language and in Franks and Teamsters that the §703(h) exception does not extend to nonseniority aspects of a promotional system. If Congress meant to immunize not only bona fide seniority systems but also nonseniority aspects of promotional systems it would presumably have said so. Nothing in the legislative history indicates such an intent. Petitioners themselves stress that Congress did not consider the mechanics of seniority systems; instead, it simply confirmed through §703(h) that the operation of bona fide seniority systems would not be made unlawful. To infer a broader intent in connection with §703(h) would allow a particularized exception to swallow up general remedial prohibi-

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agreement (A. 38). In fact, it is most of the time the case as is indicated by U.S. Dept. of Labor Bulletin No. 1425-11, "Seniority in Promotion and Transfer Provisions," p. 7 (1970).

tions in a manner obviously inimical to Congress' overriding purpose. This is manifestly not a proper matter for inference.

The Court of Appeals' decision correctly recognized that Petitioners' contentions would allow the §703(h) exception to swallow up the rule of Griggs and cover not only such nonseniority criteria as the 45-week rule but the entire host of nonseniority practices heretofore held subject to normal adverse impact principles. To prevent this result it necessarily scrutinized the 45-week rule apart from other aspects of the collectively bargained system.[14] The Court of Appeals' decision should be affirmed.

[14] While petitioners claim this approach was error, it is consistent with every other post-Teamsters appellate decision distinguishing between seniority and nonseniority criteria, Patterson v. American Tobacco Co., 586 F.2d 300 (4th Cir. 1978), rehearing en banc granted (1979); Parson v. Kaiser Aluminum & Chemical Corp., 583 F.2d 132, 133 (5th Cir. 1978); and including Alexander v. Machinists' Area Lodge No. 735, 565 F.2d 1364 (6th Cir. 1977), cert. denied 436 U.S. 946 (1978), on which petitioners rely for their assertion of conflict.

B. Achievement of Permanent Status Through Satisfaction of The 45-Week Rule Is Not A Perquisite Of "Seniority" Either As That Term Is Understood In Everyday Parlance Or In The Scholarly Literature, Government Bulletins, And Decisions Of This Court Relied Upon By The Employer And Union Parties.

According to Petitioners, the Court of Appeals erred in its view that "seniority" means length of service within an agreed upon seniority unit. They argue that organized labor and management may define and structure "seniority systems" in whatever manner suits their needs and that "seniority" can mean a host of things other than length of service.

As set forth below, Petitioners place unfounded reliance for these contentions on scholarly literature, government bulletins, and decisions of this Court. While those authorities recognize the broad flexibility enjoyed by unions and management in establishing rules of preference for job acquisition and retention, all such rules are not rules of seniority. Within a collectively-bargained preference system, seniority and nonseniority criteria most commonly operate in tandem. Petitioners' reliance

upon these authorities depends upon a semantic slight of hand; they attempt to cast the authorities' recognition of variations in the formation of collectively-bargained preference systems as support for their contention that such differences are all variations upon "seniority" or parts of "seniority systems". The attempt cannot succeed because the authorities uniformly conceive of seniority as length of service within an agreed-upon unit and view criteria other than length of service as nonseniority factors. None of the authorities support Petitioners' contention that collectively-bargained exceptions to seniority are in fact other forms of seniority.[15] While the flexibility accorded labor and management under national labor policy allows them to structure preference systems combining seniority and nonseniority factors to meet particular needs, this does

[15] A collective bargaining agreement might accord preference based on "seniority" and "ability" so as to deny preference to the most senior employee. This would not make "ability" into a form of "seniority;" it would not do so even if the agreement accomplished the same result by purporting to define "seniority" as "length of service plus ability." Ability remains a non-seniority factor just as does the criterion challenged here and cannot be brought within the Section 703(h) exception.

not mean that nonseniority criteria become criteria of seniority when operating in combination with seniority or that parties to collective bargaining can effect such transmutations through novel definitions of terms.

In common parlance, seniority means length of service. Webster's Third New Dictionary of the English Language Unabridged (1976) defines "seniority" as:

> A status attained by length of continuous service (as in a company, institution, or organization or in a department, job rank, or occupational group) to which are attached by custom or prior collective agreement various rights or privileges (as preference in tenure, priority in promotion, and choice of work or shift) on the basis of ranking relative to others.[16]

[16] Amicus EEAC cites the dictionary definition of the term "system"--"a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose"--stressing that seniority operates within the context of a "system" (EEAC Br. p. 16). It proceeds to overlook the fact that the "diverse parts" comprising such systems most often comprise both seniority and nonseniority criteria. Accordingly, EEAC's argument simply begs the question whether Congress meant to include within Section 703(h) nonseniority criteria which

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The scholarly literature and government bulletins cited by Petitioners and their amici confirm that the industrial usage of the term "seniority" is consistent with its common parlance meaning. In his law review article analyzing the nature of seniority rights, Professor Aaron defines seniority as follows:

> Seniority is a system of employment preference based on length of service; employees with the longest service are given the greatest job security and the best opportunities for advancement. Aaron, Reflections On The Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532 (1962).17

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operate in combination with seniority in a collectively-bargained job preference system. The answer cannot be determined--as Petitioners and their amici seek to determine it--simply by calling such a combined system a "seniority system."

[17]While the Petitioners stress Professor Aaron's recognition that seniority may take many different forms (Employer Br., pp. 25, 38-39; Union Br., pp. 24-25), they ignore his threshold definition of "seniority" as "length of service".

The same is true of the seminal article of Professors Cooper and Sobol assessing the impact of Title VII on seniority and testing practices. Also recognizing that "seniority" means "length of service", they state:

> The variations and combinations of seniority principles are very great, but in all cases the basic measure is length of service, with preference accorded to the senior worker. Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1602 (1969).18

Precisely the same is true of the comprehensive treatise on collective bargaining by Slichter, Healy and Livernash, The Impact of Collective Bargaining on Management (1960), on which the Union parties and the Amici in support of petitioners rely. Amici EEAC and AFL-CIO stress the treatise's statement that for competitive purposes seniority simply cannot be equated with "length of continuous service with the company" and that collectively-bargained definitions of seniority "are almost too varied to enumerate."

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[18]Petitioners again omit reference to the article's threshold recognition that--although collectively-bargained preference systems may vary in infinite ways--seniority means length of service.

Slichter, et al., p. 116; EEAC Br., p. 16; AFL-CIO Br., p. 4. The treatise's ensuing discussion identifies the variations as differences in the way that length of service is measured from agreement to agreement and within agreements depending upon the particular purpose. The treatise characterizes collectively-bargained definitions of seniority which turn on criteria other than length of service as "unorthodox" and rather rare and finds "no evidence of any trend" toward their adoption, Slichter, et al., p. 122-23. The treatise itself uses seniority to mean length of service. For example, it states: "Rarely does one find a contract clause in which seniority is the exclusive criterion for deciding on promotions." Slichter, et al., p. 198.

Given the predominance of systems combining operation of seniority and nonseniority criteria, the rareness of provisions including factors other than length of service within the seniority definition--as opposed to within the overall preference system--tellingly demonstrates that seniority is most generally understood to mean length of service in an agreed upon unit and other operative factors are generally understood to be nonseniority criteria. And the legislative

history of Title VII includes not even a hint that when Congress enacted Section 703(h) it had in mind the relatively few, unorthodox seniority definitions departing from length of service.

The Department of Labor bulletins also conceive "seniority" as a job preference based on length of service in an agree-upon unit. They confirm that the great bulk of preference systems combine seniority factors with a variety of nonseniority factors. For example, U.S. Dept. of Labor Bulletin No. 1425-11, "Seniority in Promotion and Transfer Provisions" (1970), indicates that in structuring preference systems unions have generally advocated seniority factors while management has generally advocated nonseniority factors:

> In management's view the selection of employees should be based on merit and ability rather than seniority, except where the qualifications of the employees being considered are relatively equal....
>
> * * * *
>
> Unions, on the other hand, are likely to question management's ability to judge accurately the relative qualifications of employees, and claim seniority based on length of service to be more equitable and objective. The absence of generally accepted standards, unions maintain, will inevitably

result in discrimination and favoritism. Bulletin No. 1425-11, p. 1.

The Bulletin recites that the great bulk of collectively-bargained preference systems combine seniority with a variety of nonseniority factors:

> Of 1,201 agreements containing promotion details, 93 percent (1,112) covering 95 percent of the workers, indicated that seniority could be considered in making promotions..., but more often than not in combination with other factors, such as skill, merit, aptitude, etc. Promotion provisions based only on seniority, frequently considered impracticable by management and some unions for any but the most routine jobs or narrowest skills, were relatively rare. Such clauses occurred in only about 3 percent of the agreements having seniority provisions, and involved less than 2 percent of the workers. Bulletin No. 1425-11, p. 5.

The Bulletin recognizes the frequency of appearance of nonseniority factors without identifying them as "seniority:"

> Nonseniority factors. Nine-tenths of the agreements having promotion provisions covering the same proportion of workers, stipulated that factors in addition to seniority would be considered. Bulletin No. 1425-11, p. 7 (footnotes omitted).[19]

[19]The bulletin summarizes the results of its survey as follows, id. p. 7:
[continued next page]

Likewise, U.S. Dept. of Labor Bulletin

[from previous page]

Type of Agreement	Agreements	Workers (In Thousands)
Total Agreements with Promotion Details	1,201	4,775.6
Total Agreements with Nonseniority Factors	1.080	4,264.5
Skill and Ability	792	3,116.4
Physical Fitness	242	993.5
Education or Training	97	294.2
Tests or Examinations	49	114.4
'Qualifications'	370	1,329.2
Other	33	143.4
Total Agreements Without Nonseniority Factors	121	491.1

This analysis is set forth in greater detail addressing agreements in particular industries in a Table at p. 39 of the Bulletin. The Bulletin unequivocally and consistently treats "seniority" as length of service and considers other factors as "nonseniority." The only scintilla of support for Petitioners' position appearing in the Bulletin is its observation--the same as that of the Slichter treatise--that a few agreements define seniority as a combination of length of service and other factors, Bulletin No. 1425-11, p. 5. Significantly, in the parlance of the Bulletin itself and that of the other authorities on which Petitioners rely "seniority" is "length of service" and other factors are "nonseniority".

No. 908-11 (1949), "Collective Bargaining Provisions-Seniority," recognizes that preference systems typically combine seniority and non-seniority factors:

> Where length of service is the sole factor recognized, seniority is termed "straight" or "strict." Where the relative qualifications of the employees involved are given some weight, seniority is called "modified" or "contingent". U.S. Dept. of Labor Bulletin 908-11, p. 3.

This Bulletin as well recites that unions have favored length of service as the exclusive factor in determining employment preference while employers have "sought to modify strict seniority" by the recognition of such nonseniority factors as "qualification, skill, or ability to perform the available work." Bulletin No. 908-11, p. 2. Finally, U.S. Dept. of Labor Bulletin No. 1425-14, "Administration of Seniority" (1972), discusses collectively-bargained arrangements similar to the one here. In a chapter entitled--notably--"Separate Seniority Systems," the Bulletin takes up temporary and seasonal workers:

> Companies in a number of industries frequently hire workers on a temporary or seasonal basis to meet increased workloads during the busy season, to serve as vacation relief-

> men, to meet emergencies, or for special projects or production requirements....
>
> * * * *
>
> A few provisions permitted temporary or season employees seniority, but only among themselves....
>
> * * * *
>
> Twenty-five agreements in the sample dealt with the seniority status of temporary or seasonal employees in the event they acquired regular employee status...." U.S. Dept. of Labor Bulletin No. 1425-14, pp. 11-12.

The Bulletin's chapter on Separate Seniority Systems is plainly supportive of the Court of Appeals' observation that the collective bargaining agreement in this case contained separate seniority systems for permanent and temporary employees and that the acquisition of permanent status was not itself part of either.

The same responses apply to Petitioners' reliance upon this Court' decisions in Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949), and Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). Those decisions also recognize the leeway accorded to collective bargaining parties in structuring job preference systems. Based on that recognition, the Court upheld aspects of collectively-

bargained preference systems against attack by persons asserting violation of seniority rights. Nothing in those cases turned upon a determination whether or not the provisions in question were perquisites of seniority.[20]

Campbell was a suit by returned veterans asserting deprivation of seniority rights incident to a lay-off when employees junior to them were retained pursuant to a provision according retention preference to union grievance chairmen. The Court upheld operation of the grievance chairmen preference as a permissible result of collective bargaining. It has no occasion to conclude that this preference was a perquisite of "seniority". Petitioners rely on the decision because in upholding the provision for retention of the union chairmen the Court referred to it as a "seniority preference," 337 U.S. at 528, n. 5. At the same time, however, the Court characterized the

[20] In contrast, the cases relied upon below in part C do turn upon the distinction between seniority and nonseniority criteria and establish a test under which the criterion involved here is plainly not a perquisite of seniority.

retention as "beyond the routine requirements of seniority," id. The retained veterans in Campbell did not prevail because they had been accorded precisely the same seniority credit they would have accrued had they remained in civilian employment. Having suffered no "loss of seniority", they had no meritorious complaint against operation of a legitimate retention preference for union grievance chairmen.[21]

Ford Motor Co. v. Huffman, supra, was a suit by employees asserting violation of seniority incident to a lay-off when other employees were retained pursuant to a provision according seniority credit for pre-employment military service. As in Campbell, the Court upheld operation of the collectively-bargained provision based on the leeway properly accorded to employers and unions in constructing job preferences through collective bargaining. Again, nothing turned on whether or not the particular preference under challenge was a perquisite of senior-

[21] That the grievance chairmen's preference is not a perquisite of seniority is confirmed by Bulletin No. 908-11, supra, p. 36 , which lists such provisions among several exceptions to seniority rules.

ity.[22]

Similarly, no support for petitioners' contentions can be found in the existence of analogues to the 45-week rule in other collective bargaining agreements (see Brief of Amicus AFL-CIO, pp. 28 et seq.). Whether such provisions are common or uncommon is not relevant to whether they are rules of seniority. Indeed, the single decision addressing that issue--as set forth below in Part C--hold that a provision virtually on all fours with that here is not a rule of seniority. Suffice it to say here that the Court of Appeals'holding that permanent status based on the 45-week rule is not a perquisite of seniority is wholly consistent with the usage of that term aa reflected by the very authorities on which petitioners rely. To ascribe a broader meaning

[22]Though nothing turned on the inquiry in that case, the credit for pre-employment military service presumably is a perquisite of seniority. It is a part of the employee's overall length of service and it is a credit which would have automatically accrued had the employee entered civilian employment at an earlier time instead of going into military service. See Part C, infra. As such it is unlike permanent status based on satisfaction of the 45-week rule which would not be expected to accrue with the mere passage of time.

to the term in construing an exception to a remedial statute would be contrary both to the standard usage of the term and established principles of construction heretofore followed by this Court.

C. The Court Of Appeals' Holding That Attainment Of Permanent Status Based On The 45-Week Rule Is Not A Seniority Perquisite Is Supported By Decisions Of This Court And Lower Federal Courts Distinguishing Between Seniority And Other Benefits.

In concluding that satisfaction of the 45-week rule is not a perquisite of seniority, the Court of Appeals reasoned that seniority rights by their nature develop automatically with the passage of time: "Under a seniority system, rights normally accrue automatically in the absence of resignation, termination, or transfer." (Pet. A. 11 , 585 F. 2d at 427). The Court of Appeals observed that this was not the case with the 45-week rule. Rather than growing automatically with the passage of time, "...an employee's chances of satisfying the provision automatically terminate at the end of each year," id. The Court of Appeal proceeded to distinguish plant seniority under the agreement before it from permanent status: "...[P]lant seniority, unlike permanent status, depends only on the passing of time and accumulates incrementally and automatically." Id.

The Court of Appeals' reasoning is supported - and its conclusion compelled - by decisions of this and lower federal courts in the single other area of federal labor law calling for distinctions between seniority and nonseniority perquisites. Those decisions - addressing the employment rights of returning veterans - forcefully buttress the Ninth Circuit's conclusion. Significantly, this Court in Franks v. Bowman Transportation Co., 424 U.S. at 778, has already found reference to those decisions pertinent to resolution of seniority issues under Title VII.

Under the Military Selective Service Act, 50 U.S.C. App. §451, et seq., and its predecessors, Congress has sought to protect veterans returning to civilian jobs from being penalized for having served in the Armed Forces. Section 9 of the Act now in force, 50 U.S.C. App. §459, guarantees reinstatement with the same levels of seniority, status, and pay that the individual would have enjoyed had he remained in civilian employment. Section 9(c)(1) of the Act distinguishes between rights of seniority and other benefits. Returning veterans are reinstated "without loss of seniority";

with respect to "other benefits", however, they are entitled to participate only "pursuant to established rules and practices relating to employees on furlough or leave of absence...." Thus, veterans receive the seniority benefits they would have accrued-without regard to rules and practices governing furloughed employees - but are entitled to other benefits only to the same extent as furloughed employees. This Court has had several occasions to apply these principles and to distinguish between "seniority" and "other" benefits, Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946); Oakley v. Louisville & Nashville R. Co., 338 U.S. 278 (1949); Kinney v. Missouri-Kansas-Texas R. Co., 357 U.S. 265, 272 (1958); Tilton v. Missouri Pacific R. Co., 376 U.S. 169 (1964); Accardi v. Pennsylvania R. Co., 383 U.S. 225 (1966); Eagar v. Magnia Copper Co., 389 U.S. 323 (1967); Foster v. Dravo Corp. 420 U.S. 92 (1975); Alabama Power Co. v. Davis, 431 U.S. 581 (1977).

The thread common to all of these decisions was articulated by the Court in Foster v. Dravo Corp., supra:

> [T]he Court has consistently applied the statute to assure that benefits and advancements that would necessarily have accrued by virtue of continued employment would not be denied the veteran merely because of his absence in the military service....On the other hand, where the claimed benefit requires more than simple continued status an an employee, the Court has held that it is not protected by the statute. 420 U.S. at 97.

Thus, while the Court has treated as "seniority" those benefits which would necessarily have accrued it has treated as "other" benefits those which would not.

The decisions holding that seniority does not encompass perquisites which would not necessarily accrue with the passage of time provide especially forceful support for the Court of Appeals' decision because they arose in a statutory context where seniority has been broadly construed in order to carry out Congress' single objective of protecting returned veterans, Fishgold, supra, 328 U.S. at 285; Accardi, supra, 383 U.S. at 229. As set forth in Part I-A, supra, no such broad construction of seniority is appropriate here; to the contrary the seniority exception of Section 703(h), like other exceptions to rules

generally imposed by remedial statutes, should be construed narrowly. Therefore, conclusions reached in returned veterans cases that particular employment perquisites are not aspects of seniority, apply a fortiori here. At the same time, results based on concepts of seniority stretched to fulfill Congress' aim of protecting returned veterans would be of doubtful application.

In Accardi, the Court did construe seniority expansively so as to include severance payments based on length of service and thereby entitle veterans to full credit for military time. Looking to Congress' purpose to protect rights of veterans that "would have automatically accrued" had they remained in private employment, the Court reasoned that the severance credits in that case would have accrued practically automatically in that a full year's credit could be achieved by working a mere seven days. The Accardi Court reasoned further that severance pay was not compensation for service during a particular year - as stated, a mere seven days of service could yeild a year's credit - but rather was compensation for loss of a job computed in

proportion to seniority.[23] Notably, in Foster v. Dravo Corp., supra, the Court stated that it had in Accardi extended the seniority concept "to a benefit not traditionally considered a seniority right", 420 U.S. at 97, but declined to extend the concept even further to cover entitlement to vacation pay for years in which the veteran was absent. Even though full credit for the year could have been achieved by virtue of only a few "carefully spaced hours of work," Foster v. Dravo Corp., 420 U.S. at 100, and could therefore be said to be accruable almost automatically, the Court concluded that vacation pay was a benefit rewarding time actually worked and not a perquisite of seniority. Significantly, the Court stated that the demand for vacation pay in Foster

> ... would extend the statute well beyond the limits set out in our prior cases. Generally, the presence of a work requirement is strong

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[23] The Court stated:

> The requirements of the ... Act are not satisfied by giving returning veterans seniority in some general abstract sense and then denying them the perquisites and benefits that flow from it. Accardi, supra, 383 U.S. at 230.

> evidence that the benefit in question was intended as a form of compensation. 400 U.S. at 99.

The same can be said even more definitely of the work requirement in this case which - unlike those in Accardi and Foster- requires not a mere few days or hours of work but of 45 complete weeks within a calendar year.

Under this Court's most recent articulation of the test for distinguishing seniority from other benefits in Alabama Power Co. v. Davis, supra, the rule involved here is plainly not a rule of seniority:

> If the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in the nature of a reward for length of service, it is a 'perquisite of seniority.' If, on the other hand, the veteran's right to the benefit at the time he entered the military was subject to a significant contingency, or if the benefit is in the nature of short term compensation for services rendered, it is not an aspect of seniority within the coverage of §9. 432 U.S. at 499 .

Here, the benefit of permanent status does not accure with reasonable certainty based on continuous employment nor is it predicated on length of service. It can-

not therefore be a perquisite of seniority.

That this is so is indicated most plainly by Cox v. International Longshoremen's Assn., Local 1273, 343 F. Supp. 1292 (S.D. Tex. 1972), aff'd 476 F. 2d 1287 (5th Cir., 1973), cert. denied, 414 U.S. 1116. That case involved a provision - virtually on all fours with the 45-week rule in this case - which required longshoremen to work at least 1200 hours in a calendar year to advance out of the casual classification to the "D-1 classification." There, as here, employees in the superior classification enjoyed preference in work opportunities. The Court observed that satisfaction of the 1200 hour rule and consequent advancement from "D" to "D-1" status could not reasonably be expected:

> The facts in this lawsuit make it perfectly clear that advancement from casual or D status employment to D-1 classification requires affirmative discretionary action of management. While it is true that, once a casual longshoreman accumulates 1,200 hours in a fiscal year, he is automatically entitled to a D-1 seniority classification, the attainment of 1,200 hours in a fiscal year is not simply a matter of continuous employment. The casuals or D classified men are not pre-selected, by

> application or otherwise, by management. The selection of casuals for any work at all is a result of a daily exercise of supervisory discretion performed by numerous gang foremen throughout the year. Fitness, ability, agility, strength, reliability, experience, acquaintanceship and even being related to another longshoreman are some of the factors commonly given consideration by gang foremen in choosing their gangs. This daily selection process serves to eliminate the vast majority of the casual laborers. Since there is a huge surplus of men for the available work in this industry, there is simply no reasonable certainty that casuals as a group will attain seniority status. In fact, in 1968, the year plaintiffs Cox and Palmer obtained D-1 classification, only four percent of the casuals actually made this advancement.[24]

Cox, supra, 343 F. Supp. at 1299-1300. Stating that advancement to "D-1" status was "obviously the exception and not rule," the Court concluded that such status was not a perquisite of seniority under the Military Selective Service Act. The

[24] This case is like Cox in that attainment of permanent status based on the 45-week rule is not automatic or even reasonably to be expected with the passage of time. In addition, as in Cox, while the collective bargaining agreement provides for referral of temporary employees in line with their seniority, it leaves to the employers absolutely unfettered discretion in selecting among them (A.38, Agreement, Sec. 5(c)(2)).

District Court opinion in Cox was adopted by the Court of Appeals' order of affirmance and certiorari was denied. Only by the anomalous act of construing seniority more broadly under Section 703(h) than it was properly construed under the Military Selective Service Act in Cox could this Court hold that the Ninth Circuit was mistaken and reach the result advocated by Petitioners.

II. THE PROPOSED SOLUTIONS OFFERED BY AMICI EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE AFL-CIO, WHILE DISPLAYING GREATER SENSITIVITY TO TITLE VII'S GOALS THAN THE POSITIONS TAKEN BY PETITIONERS, ARE ALSO UNTENABLE.

The Briefs of Amici Equal Employment Advisory Council and the AFL-CIO implicitly recognize the difficulty inherent in the positions taken by the Petitioners. Thus, they recognize that if seniority systems were to enjoy blanket protection impervious to scrutiny of their individual components, the result would be necessarily to allow Section 703(h) to swallow up the normal rule of Griggs and immunize the entire gamut of nonseniority criteria in cases where such practices are integrated under the umbrella of a "seniority system". (EEAC Br., pp.29, et seq.; AFL-CIO Br., pp. 24-25, n. 10).

Amicus EEAC offers a proposed accommodation of Section 703(h) with the rule of Griggs in Section III-C of its Brief. It suggests that a requirement with adverse impact not stemming from perpetuation of a past parctice - such as passing a test - would be outside the protection

of Section 703(h) despite its nexus to a "seniority system."[25] EEAC says that requirements whose adverse impact stems solely from a tendency to perpetuate past acts are protected by Section 703(h). It asserts that the 45-week rule enjoys Section 703(h) protection as such a requirement.

While EEAC's argument displays more sensitivity to Title VII's goals than those of the Petitioners, it is also untenable because it offers no logical ground for distinugishing between adverse impact which stems from perpetuation of past discrimination and that which does not. If - as EEAC argues along with Petitioners - Congress meant broadly to protect employee expectations arising from the operation of "seniority systems," there is no basis for EEAC's suggested distinction between the two forms of adverse impact. Were "permanent" status hinged not upon passing a test, eliminating the test would cause the same "reshuffling" of employee expectations.

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[25] Thus EEAC concedes the propriety of separate scrutiny of individual component criteria of a preference system.

The basic flaw of EEAC's position is that while it recognizes the difficulties inherent in the claim of absolute, blanket protection for "seniority systems", it nevertheless asserts an unduly broad construction of "seniority". EEAC argues that seniority under Section 703(h) should be "broadly construed", a position inconsistent with the principle that exceptions to the general provisions of remedial statutes should not be so construed. In fact, EEAC - like the Petitioners - argues for a construction of seniority under Section 703(h) broader than that articulated by this and lower courts in construing seniority under the Military Selective Service Act and its predecessors. By that measure, permanent status under the collective bargaining agreement involved in this case cannot be a perquisite of seniority because it does not accrue automatically - indeed, cannot even be reasonably expected to accrue - with passage of time as an employee. To call employee expectations founded upon such a rule "seniority expectations" and thus claim for them protection under Section 703(h) is simply to play with words. Implicit in the Court

of Appeal's decision is the correct recognition that expectations founded upon a nonseniority rule cannot be "seniority expectations". This is no less so when the particular nonseniority rule has an adverse impact apart from perpetuation of past discrimination than when perpetuation of past discrimination is the sole adverse impact.

EEAC's approach must be rejected because it calls for a construction of "seniority" ranging far beyond that applied by this and lower courts in a setting where a broad construction of that term is mandated. It is inconsistent with the principle of Griggs that employment practices with adverse impact are equally susceptible to Title VII attack whether or not such impact stems from the perpetuation of a past practice.

The AFL-CIO suggests a different approach, Br. 24-25, n. 10. It acknowledges the operation of nonseniority factors which "override" seniority in many collectively-bargaining systems. It suggests that Section 703(h) should not extend to decisions based on such factors to bypass the most senior employee; such decisions, it says, should be "measured by Title VII's commands

exclusive of §703(h)." We agree with this position as far as it goes. At the same time, however, the AFL-CIO's position would allow labor and management simply to incorporate the same other factors into their definition of seniority and thereby bring them within the Section 703(h) seniority exception. It would be the ultimate oddity to apply different legal tests to selection decisions turning upon the same criteria depending merely on whether or not labor and management include nonseniority criteria within their definition of seniority as opposed to referring to them outside the seniority definition as factors which would override seniority. Notably, the AFL-CIO does not suggest that Congress actually intended such a distinction. Certainly nothing in the legislative history suggests that it did. As a possible accommodation of general Title VII rules with the Section 703(h) seniority exception, the approach must be rejected because of the irrational consequences discussed above and because it would allow parties to collective bargaining to expand the scope of the Section 703(h) exception through the breadth of their own seniority definitions.

The Court of Appeals' decision, rather than the proposals suggested by Amici EEAC and AFL-CIO, represents the proper accomodation of general Title VII rules with the seniority exception. It is only by scrutiny of the individual elements of a preference system that a court may separate seniority criteria subject to Section 703(h) from nonseniority criteria whose adverse impact, of whatever sort, is subject to attack under Griggs. It is only this approach which prevents the Section 703(h) exception from swallowing up Title VII's general rules. To the extent that this approach may result in a "reshuffling" of expectations, the expectations affected are not expectations based on seniority and therefore cannot properly command protection under Section 703(h).[26]

CONCLUSION

The Court of Appeals properly determined that this matter should be remanded to the District Court to allow proof of the challenged practice's adverse impact, if any. For the reasons stated herein, the

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[26] Compare, Franks v. Bowman Transportation Co., supra, 424 U.S. at 775-79

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decision of the Court of Appeals should be affirmed.

DATED: October 2, 1979.

Respectfully submitted,

JACK GREENBERG
BARRY L. GOLDSTEIN
O. PETER SHERWOOD
JAMES M. NABRITT, III
NAACP Legal Defense &
Educational Fund, Inc.

DANIEL B. EDELMAN
Yablonski, Both &
Edelman

VILMA S. MARTINEZ
MORRIS J. BALLER
Mexican American Legal
Defense and Educational
Fund, Inc.

Attorneys for Amici Curiae

[from previous page] (modifications of employee expectations are no bar to appropriate seniority remedies for Title VII violations and in other statutorily commanded circumstances).